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Abstract
It can be difficult for an employer or a recipient of federal funds to determine exactly what types of disabilities are protected by the Rehabilitation Act of 1973. Relevant literature has not given a great deal of attention to this specific question. Recent cases, however, provide additional information that can assist in determining which disabilities are protected. The question of what is protected handicap differs from the question of whether a handicapped person is also "qualified." This article focuses on the threshold question of determining whether a handicap actually exists, concentrating on the Rehabilitation Act of 1973. The definition of protected handicaps found in the Rehabilitation Act of 1973 and in the corresponding regulations are also examined. Additionally, this article discusses court decisions addressing different types of disabilities in order to provide a clearer sense of what is being recognized as a protected handicap.

Keywords
Discrimination against people with disabilities

Disciplines
Civil Rights and Discrimination | Labor and Employment Law

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What Disabilities are Protected Under the Rehabilitation Act of 1973?

BY DAVID A. LARSON*

It can be difficult for an employer or a recipient of federal funds to determine exactly what types of disabilities are protected by the Rehabilitation Act of 1973.[1] Relevant literature has not given a great deal of attention to this specific question.[2] Recent cases, however, provide additional information that can assist in determining which disabilities are protected.

The question of what is a protected handicap differs from the question of whether a handicapped person is also "qualified."[3] This article focuses on the threshold question of determining whether a handicap actually exists,[4] concentrating on the Rehabilitation Act

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1. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1985).

2. For an article devoted in part to defining the term handicap, see Comment, *Employment Discrimination—Analyzing Handicap Discrimination Claims: The Right Tools for the Job*, 62 N.C.L. REV. 535 (1984). For a discussion of handicaps specifically in light of E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980), see, Haines, E.E. Black, Ltd. v. Marshall: *A Penetrating Interpretation of 'Handicapped Individual' For Sections 503 and 504 of the Rehabilitation Act of 1973 and for Various State Equal Employment Opportunity Statutes*, 16 LOY. L.A.L. REV. 527 (1983); *see also* Note, *The Rehabilitation Act of 1973: Who Is Handicapped Under Federal Law?*, 16 U.S.F.L. Rev. 653 (1982).

3. "Qualified" handicapped persons are those persons protected under § 793 (addressing government contractors in excess of $2,500) of the Rehabilitation Act. "Otherwise qualified" persons are protected under § 794 (addressing programs receiving federal financial assistance). *See* Southeastern Community College v. Davis, 442 U.S. 397 (1979) (nursing program denied admission to plaintiff with serious hearing disability because of her failure to meet legitimate physical requirements. Denial upheld in that otherwise qualified person is one who is able to meet all of a program's requirements in spite of a handicap).

4. The term "handicap" will appear as a frequent reference in this article. Certain groups may prefer the adjective "disabled" and the author recognizes and acknowledges that preference. "Handicapped" will often appear because the article represents an attempt to explain how that particular term, which was selected by the legislature, has been defined by the courts.

There is only limited discussion of various disabilities that have been reviewed under state anti-discrimination statutes. Forty-five states have statutes prohibiting discrimination against the handicapped. Comment, *supra* note 2, at 540 n.34 (citing PRESIDENT'S COMM. ON EMPLOYMENT OF THE HANDICAPPED, SELECTED STATE AND FED. LAWS AFFECTING EMPLOYMENT AND CERTAIN RIGHTS OF PEOPLE WITH DISABILITIES 68-80 (1980)). However, the

of 1973. The definitions of protected handicaps found in the Re-

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breadth and language of these protections differs substantially. Compare the Wisconsin, Alabama and Arkansas statutes:

Wisconsin § 111.32 Definitions. When used in this subchapter:

(8) "Handicapped individual" means an individual who:

(a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;

(b) Has a record of such impairment; or

(c) Is perceived as having such an impairment.

§ 111.321. Prohibited bases of discrimination. Subject to §§ 111.33 to 111.36, no employer, labor organization, employment agency, licensing agency or other person may engage in any active employment discrimination as specified in § 111.322 against any individual on the basis of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, arrest record or conviction record.

§ 111.34. Handicap; exceptions and special cases

(1) Employment discrimination because of handicap includes, but is not limited to:

(a) Contributing a lesser amount to the fringe benefits, including life or disability insurance coverage, of any employe because of the employe's handicap; or

(b) Refusing to reasonably accommodate an employe's or prospective employe's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.

(2)(a) Notwithstanding § 111.322, it is not employment discrimination because of handicap to refuse to hire, employ, admit or license any individual, to bar or terminate from employment, membership or licensure any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment if the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment, membership or licensure.

(b) In evaluating whether a handicapped individual can adequately undertake the job-related responsibilities of a particular job, membership or licensed activity, the present and future safety of the individual, of the individual's coworkers and, if applicable, of the general public may be considered. However, this evaluation shall be made on an individual case-by-case basis and may not be made by a general rule which prohibits the employment or licensure of handicapped individuals in general or a particular class of handicapped individuals.

(c) If the employment, membership or licensure involves a special duty of care for the safety of the general public, including but not limited to employment with a common carrier, this special duty of care may be considered in evaluating whether the employe or applicant can adequately undertake the job-related responsibilities of a particular job, membership or licensed activity. However, this evaluation shall be made on an individual case-by-case basis and may not be made by a general rule which prohibits the employment or licensure of handicapped individuals in general or a particular class of handicapped individuals.

WIS. STAT. ANN. § 111.32(8)(a), (b), (c), § 111.321, § 111.34 (West 1974 & Supp. 1986) (covering all employers and both physical and mental impairments).

Alabama § 21-7-1 Declaration of Policy.

It is the policy of this state to encourage and enable the blind, the visually

habilitation Act of 1973 and in the corresponding regulations are also examined. Additionally, this article discusses court decisions addressing different types of disabilities in order to provide a clearer sense of what is being recognized as a protected handicap.

I. The Rehabilitation Act of 1973

Sections 503 and 504 (29 United States Code sections 793 and 794, respectively) of the Rehabilitation Act of 1973 [hereinafter Rehabilitation Act] establish protections under different circum-

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handicapped and the otherwise physically disabled to participate fully in the social and economic life of the state and to engage in remunerative employment.

ALA. CODE § 21-7-1 (1984) (limited to physical disability).

Arkansas § 82-2901 Policy of state.

It is the policy of this State to accord visually handicapped, hearing impaired and other physically handicapped persons all rights and privileges of other persons with respect to the use of public streets, highways, sidewalks, public buildings, public facilities, public carriers, public housing accomodations [sic], public amusement and resort areas and other public areas to which the public is invited, subject only to the limitations and conditions established by law and applicable to all persons, and subject to the special limitations and conditions prescribed herein for visually handicapped and hearing impaired and otherwise handicapped persons. It is further the policy of this State that visually handicapped, hearing impaired or other physically handicapped persons shall be employed in State service, the service of political subdivisions of this State, in the public schools, and in all other employment supported in whole or in part by public funds, on the same terms and conditions as persons who are not visually handicapped, hearing impaired or otherwise handicapped, unless it is shown that the visual, hearing or other handicap of a person prevents the performance of the work involved.

ARK. STAT. ANN. § 82-2901 (1979 and Supp. 1985) (limited to physical disability and state employment or employers receiving state assistance). As a result of such differences in statutory language, disabilities recognized as protected under one state's statute may not be recognized under another state's statute.

See Advocates v. Sears, Roebuck and Co., 67 Ill. App. 3d 512, 517-18 (1978), wherein the Illinois Appellate Court stated:

> We are aware that our interpretation of the dictionary definition [of "handicap"] places us in conflict with the reasoning of the Wisconsin Circuit Court in Chrysler Outboard Corp. v. Department of Industry, Labor & Human Relations (1976), 14 Fair Empl. Prac. Cas. (BNA) 344. The Wisconsin statute prohibiting employment discrimination against handicapped individuals (Fair Employment Code, Wis. Stat. Ann. § 111.31, et seq. (1974)), like Illinois' Equal Opportunity for the Handicapped Act, does not contain an effective definition of what constitutes a handicap . . . . From this language, we think it is clear that the Wisconsin Circuit Court followed the approach which the plaintiff has offered and which we have rejected.

The Wisconsin court decided their case before the Wisconsin legislature added subsection (8) defining handicap by amendment to WIS. STAT. ANN. § 111.32 (West 1974 & Supp. 1986). Subsection (8), defining handicap, is still quite general however, in that it protects impairments that make "achievement unusually difficult or [limit] the capacity to work."

stances.[5] Section 503 states that any private employer entering into a government contract or subcontract with a value in excess of $2,500.00 must pursue both a policy of non-discrimination against the handicapped and an affirmative action policy.[6] Section 504 prohibits handicap discrimination in any program receiving federal financial assistance.[7] In order to manage a lawful business, it thus becomes necessary to determine specifically what persons are protected by these sections.

The Rehabilitation Act provides its own definitional section:

> (7)(A) Except as otherwise provided in subparagraph (B), the term "handicapped individual" means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.
>
> (B) Subject to the second sentence of this subparagraph, the term "handicapped individual" means, for purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.[8]

Severe handicaps are further defined:

> (13) The term "severe handicap" means the disability which requires multiple services over an extended period of time and results from amputation, blindness, cancer, cerebral palsy, cystic fibrosis, deafness, heart disease, hemiplegia, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, neurological disorders (including stroke and epilepsy), para-

5. For purposes of manageability, the discussion of protected disabilities will be limited to these two sections.

6. 29 U.S.C. § 793 (1978).

7. *Id.* § 794 (1978).

8. *Id.* § 706(13) (1984).

> plegia, quadriplegia and other spinal cord conditions, renal failure, respiratory or pulmonary dysfunction, and any other disability specified by the Secretary in regulations he shall prescribe.[9]

Thus the statute specifically identifies certain severe disabilities as conditions that satisfy the statute's definition of handicap. Considering every imaginable disorder, however, it is obvious more guidance is required. The major concern is with section 7(B)(i), cited above, which asserts that a handicapped individual "has a physical or mental impairment which substantially limits one or more of such person's major life activities." Federal regulations further define which persons are covered by this language.

The Department of Labor issued regulations to further define the application of section 503. The definitional section states:

> 'Handicapped individual' means any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. For purposes of this part, a handicapped individual is 'substantially limited' if he or she is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap.[10]

This definition further refers the reader to Appendix A, which contains guidelines for the application of this definition. The guidelines state:

> '*Life activities* ' may be considered to include communication, ambulation, selfcare, socialization, education, vocational training, employment, transportation, adapting to housing, etc. For the purpose of section 503 of the Act, primary attention is given to those life activities that affect employability.
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> The phrase '*substantially limits* ' means the degree that the impairment affects employability. A handicapped individual who is likely to experience difficulty in securing retaining or advancing in employment would be considered substantially limited.[11]

The President issued Executive Order 12,250 to implement the nondiscriminatory provisions of federal statutes, including section 504

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9. *Id.*
10. 41 C.F.R. § 60-741.2 (1985).
11. *Id.* (Appendix A) (1985).

of the Rehabilitation Act.[12] This order directed executive agencies to draft regulations or issue guidelines for those receiving federal financial assistance from each agency.[13] Therefore, in cases involving specific agencies one must refer to the exact regulations or guidelines issued by that agency. That same Executive Order empowered the Department of Justice to draft regulations to coordinate the overall implementation of section 504 of the Rehabilitation Act.[14] The Department of Justice issued its own regulations pursuant to the President's delegation of authority and included a definitional section that attempts to more specifically describe protected disabilities. These regulations state:

> (b) . . . (1) "Physical or mental impairment" means: (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body

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12. Exec. Order No. 12,250, 3 C.F.R. 298 (1980). "By the authority vested in me as President . . . and in order to provide . . . for the consistent and effective implementation of various laws prohibiting discriminatory practices in Federal programs and programs receiving Federal financial assistance, it is hereby ordered as follows." *Id.*

13. Exec. Order 12,250, § 1-402. "Each Executive agency responsible for implementing a nondiscrimination provision of a law covered by this Order shall issue appropriate implementing directives (whether in the nature of regulations or policy guidance). To the extent permitted by law, they shall be consistent with the requirements prescribed by the Attorney General pursuant to this Order and shall be subject to the approval of the Attorney General, who may require that some or all of them be submitted for approval before taking effect." *Id.*

To review the regulations drafted by agencies pursuant to the directive in § 1-402 above, see 45 C.F.R. § 84.1 et seq. (1986) (Department of Health and Human Services); 22 C.F.R. § 142.1 et seq. (1985) (Department of State); 43 C.F.R. § 17.1 et seq. (1985) (Department of the Interior); 45 C.F.R. § 605.0 et seq. (1985) (National Science Foundation); 10 C.F.R. § 4.1 et seq. (1986) (Nuclear Regulatory Commission); 7 C.F.R. § 15.1 et seq. (1986) (Office of the Secretary, USDA); 32 C.F.R. § 56.1 et seq. (1985) (Office of Secretary of Defense); 29 C.F.R. § 32.1 et seq. (1985) (Office of Secretary of Labor); 38 C.F.R. § 18.1 et seq. (1985) (Veterans Administrations); 45 C.F.R. § 1232.1 et seq. (1985) (ACTION); 22 C.F.R. § 217.1 et seq. (1986) (Agency for International Development, IDCA); 15 C.F.R. § 8b.1 et seq. (1986) (Office of the Secretary Commerce); 34 C.F.R. § 104.1 et seq. (1985) (Office for Gull Rights, Education); 10 C.F.R. § 1040.1 et seq. (1986) (Department of Energy); 49 C.F.R. § 27.1 et seq. (1985) (Office of the Secretary of Transportation); 40 C.F.R. § 7.10 et seq. (1985) (Environmental Protection Agency); 11 C.F.R. § 6.101 et seq. (1986) (Federal Election Commission); 14 C.F.R. § 1251.00 et seq. (1986) (National Aeronautics and Space Administration); 45 C.F.R. § 1151.1 et seq. (1985) (National Foundation of the Arts and Humanities); 45 C.F.R. § 1170.1 et seq. (1985) (National Foundation on the Arts and Humanities); 13 C.F.R. § 113.1 et seq. (1985) (Small Business Administration); 18 C.F.R. § 1307.1 et seq. (1985) (Tennessee Valley Authority).

14. Executive Order No. 12,250, § 1-201. "The Attorney General shall coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions of the following laws: . . . (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794)." *Id.*

> systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.
>
> (2) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.[15]

These definitions provide a better understanding of what disabilities are protected. The critical concern, however, is the manner in which courts have responded to assertions that particular disabilities should be protected.

II. Cases Defining Handicapped under the Rehabilitation Act of 1973

This section begins with a discussion of why employers seldom challenge allegations that an individual is handicapped. It then focuses upon specific court decisions that define protected handicaps. Included are cases in which defendants have successfully challenged plaintiffs' claims of a protected handicap. This section also explains the approach a defendant can use to challenge a plaintiff's efforts to establish a protected handicap, discussing at length how to determine whether a handicap exists.

Frequently cases brought under the Rehabilitation Act do not raise questions as to whether individuals are handicapped. Rather, the employer concedes that a handicap does exist. For example, in *Strathie v. Department of Transportation*,[16] the plaintiff wore a hearing aid in violation of one of the Department of Transportation's regulations. Without the hearing aid, Strathie could not pass the department's hearing requirements. This case is illustrative of many cases wherein it is "undisputed that Strathie [or any plaintiff]

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15. 28 C.F.R. § 41.31(b)(1)(2) (1985).
16. 716 F.2d 227 (3rd Cir. 1983).

is a handicapped person, and that his license was suspended solely by reason of his handicap."[17] Defendants accepted the existence of a handicap and instead focused upon the question of whether the plaintiff was "otherwise qualified."[18] The plaintiff in *Strathie* had a disability that was expressly within the regulations issued by the Department of Justice for section 504.

The plaintiff in *Longoria v. Harris*[19] was a 37 year old male who had his right leg amputated below the kneecap. Plaintiff left his employment with the Harlingen Consolidated Independent School District due to an improperly fitted prosthesis, which caused blistering. After several intervening jobs, plaintiff reapplied to the school and was informed that he could not qualify as a bus driver because of the loss of his leg. Plaintiff had previously served as a bus driver when he had worked for the school district four years earlier. As in *Strathie*, the employer acknowledged the existence of a protected disability and the case instead focused upon whether plaintiff was a "qualified individual" and not whether plaintiff had a protected disability.[20]

A. Why is it Uncommon to Challenge the Existence of a Physical Handicap?

Where there has been an allegation of a protected impairment, defendants have appeared hesitant to challenge that allegation. If

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17. *Id.* at 230.

18. *Id.*

19. 554 F. Supp. 102 (S.D. Tex. 1982).

20. *Id.* at 104. Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130 (S.D. Iowa 1984) provides an additional example of an employer conceding that a handicap exists. Plaintiff was a multiply handicapped individual with his most apparent handicap being left side hemiplegia due to cerebral palsy. This did not amount, however, to complete paralysis and plaintiff did have sufficient use of the left arm, hand and leg to be able to walk without assistance and to perform such functions as lifting children and driving. He was licensed to drive without restrictions in Vermont, was previously licensed to drive in New York and had a chauffeur's license in New York.

Plaintiff also suffered from nocturnal epilepsy and dyslexia. The epilepsy, however, was controlled by medication and plaintiff never had a seizure while awake. Dyslexia, which is a reading disability, prevented plaintiff from having the ability to read at a level above sixth grade when plaintiff did his own reading visually. In the same manner as many blind individuals, plaintiff was able to compensate for this problem by using tape-recordings and readers. In fact, plaintiff had obtained a bachelors and a masters degree. There was no evidence that the dyslexia had hindered his ability to work as a teacher's aide or as a substitute teacher for children whose reading skills were less than his. Once again there was no dispute that plaintiff was a "handicapped individual." Rather, the issue was whether plaintiff was "otherwise qualified." *Id.* at 1135-36. *See also* Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983) (plaintiff's dyslexia resulted in low score on employer's written apprenticeship examination and created an obligation for employer to make reasonable accommodation under the Rehabilitation Act).

one is familiar with personal injury defense work, however, one knows that it is common for defendants to acquire adverse medical examinations as a check on the plaintiff's assertions of injury. In the area of handicaps, however, there is little case law chronicling such challenges. It is clear that if a defendant can establish that the plaintiff does not suffer from a protected handicap, the defendant will prevail. Why have defendants not aggressively attacked plaintiffs' allegations of disabilities?

The first possible reason is that few cases are litigated unless the plaintiff is clearly handicapped. This occurs because of a subtle reason that may affect only some cases and which is a consequence of a common societal attitude. Physical and mental disabilities often acquire a social stigma that may alienate and isolate the sufferer far more effectively than the limitations imposed by the disability itself. Medical uncertainty about the exact nature of a disability, misinformation, or even simple ignorance regarding available information may cause people without serious disabilities to avoid the disabled. Few people would eagerly invite this type of avoidance attitude.

A personal injury damage lawsuit, on the other hand, involves merely a stroke of bad luck rather than any social stigma. Any healthy, so-called ordinary person may suffer a personal injury. Furthermore, a personal injury cannot be passed on to anyone else. Labeling oneself as an accident victim may not alienate others as completely as disclosing a handicap and thus people may be more willing to make claims as a result of personal injury. There is also a sense of righteousness in a personal injury lawsuit. The injured person was wronged and is simply asking for what they are due. The marginal personal injury claim is thus more likely to fit nicely with our concept of fault-based liability.

Genetic or disease-based disabilities, however, suggest a sense of inferiority to some persons. Furthermore, in the employment context, one is not suing the person that is responsible for the disability, but rather someone that refuses to accommodate that disability. Few people are enthusiastically awaiting the opportunity to publicly declare a condition that may involve a social stigma and then additionally announce that they cannot function without help, or in other words, without reasonable accommodation. A partially disabled person may find it much less burdensome to quietly struggle with his or her disability, make excuses, and suffer the consequences rather than to publicly declare his condition. As a result, marginal disability claims are not litigated.

Another reason that there does not appear to be a great deal of case law involving challenges to plaintiffs' allegations of protected disabilities may be the fact that defendants have a second line of defense. A defendant can concede that a disability exists and still prevail in the lawsuit. Furthermore, aggressively challenging a plaintiff's allegation of disability may adversely affect the defendant's position by making defendant appear insensitive and unsympathetic. By conceding the plaintiff's disability, the defendant can forego this challenge, recognize and sympathize with the plaintiff's disability, but still continue to explain that unfortunately the plaintiff was not "otherwise qualified" and simply cannot perform the job. The defendant can then avoid the rather nebulous problem of trying to determine at what point does an impairment amount to a "handicap." The defendant can instead focus upon what the plaintiff apparently can or cannot do and assert that the plaintiff is not "otherwise qualified."

Finally, many potential plaintiffs may perceive the marginal case as extremely difficult to win. A plaintiff must first show that he or she has an impairment that substantially limits a major life activity. That same plaintiff must then come back and show, however, that he or she is not so handicapped that a particular job cannot be properly performed.[21] A concentrated effort to convince a skeptical court that a disability actually exists may also have the unintended result of convincing that same body that the handicap prevents effective performance of a job.

B. Weight and Left-Handedness

Although it may appear that few plaintiffs are making handicapped claims in marginal cases, such claims do exist. In the following cases, one plaintiff attempted to establish he was handicapped as a result of his left-handedness and another alleged that his high body weight, resulting from weight-lifting, made him handicapped.

Tudyman v. United Airlines[22] reviewed the charges of a 5'7 1/2" man who weighed 15 pounds over the maximum weight permitted by United Airlines for a man of his height. Plaintiff brought suit alleging he was a handicapped individual and that his dismissal violated section 504.

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21. For a reference to this "catch 22" aspect of § 504, see Doe v. Region 13 Mental Health-Mental Retardation Comm., 704 F.2d 1402, 1408 n.6 (5th Cir. 1983). *See infra* notes 37-44 and accompanying text.

22. 608 F. Supp. 739 (D.C. Cal. 1984).

Plaintiff was not an individual in poor physical shape. To the contrary, the reason he exceeded the weight limit was that he was an avid bodybuilder with a low percentage of body fat and a high percentage of muscle. The court denied plaintiff's claim for several reasons. The failure to qualify for a single job does not constitute being limited in a major life activity.[23] Furthermore, plaintiff's alleged "unique musculo-skelital [sic] system and body composition" were not the result of physiological disorders, cosmetic disfigurement or anatomical loss as described in the applicable federal regulations.[24] Finally, suggesting that an involuntary weight problem due to a cause such as glandular malfunction might be viewed differently, the court concluded that this plaintiff's weight was arrived at by choice. Section 504 evidences an intention not to protect individuals with voluntary impairments in that it excludes certain current drug and alcohol abusers from protection.[25]

The plaintiff in *Torres v. Bolger*[26] alleged that his employer terminated him on the basis of his handicap, specifically his left-handedness. Although he was able to deliver street mail with his right hand, plaintiff had difficulty using that hand. His continued slowness in delivering mail resulted in his discharge.

The court stated that plaintiffs have the burden of establishing by a preponderance of the evidence that they are "handicapped individuals."[27] The court concluded that left-handedness is no more an impairment than being right-handed or ambidextrous. Plaintiff was in perfect health, was able to perform a wide variety of tasks without apparent difficulty and was an accomplished college athlete. The acceptance of plaintiff's theory would have rendered futile federal programs of vocational rehabilitation and bound Congress to a wholly unimaginable civil rights violation.[28]

Additionally, the court asserted that an impairment that interferes with a particular job, but does not otherwise decrease an individual's ability to obtain satisfactory employment, is not "sub-

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23. *Id.* at 745-46.

24. *Id.* at 746 (citing 45 C.F.R. § 84.3(j)(2)(i)).

25. *Id.* (citing 1978 amendments to Rehabilitation Act of 1973 to support its position that Congress did not intend to protect body-builders when it passed the Rehabilitation Act of 1973. The court did not address the assertion that drug dependence and alcoholism are themselves not voluntary conditions.).

26. 610 F. Supp. 593 (D.C. Tex. 1985).

27. *Id.* at 596.

28. *Id.*

stantially limiting" for purposes of the Rehabilitation Act.[29] Thus plaintiff's claim failed in two respects. His left-handedness was not an impairment and it did not substantially limit any major life activity.

C. Drug or Alcohol Abuse

Drug and alcohol abusers do not fit nicely into everyone's conception of a handicapped person. There are two complicating aspects to drug and alcohol abuse. First, there is an elusive aspect to this alleged disability. When drugs and alcohol are not consumed, the user may appear fully capable. Additionally, there is often a belief that the abuser's condition is voluntary and thus not deserving of protection. The severe social stigma that accompanies disclosure makes it unlikely that anyone would litigate an occasional misuse problem.[30]

Needless to say, cases of drug use or alcohol abuse often arouse intense emotion. As the following court decisions illustrate, persons with such problems do fall within the protections of the Rehabilitation Act.

In *Davis v. Boucher*,[31] plaintiff Salvatore D'Elia was a former narcotics addict who was enrolled in a methadone program. D'Elia had filed a job application with the City of Philadelphia. Random urine samples required by federal law showed that he was not using drugs other than methadone. He was denied employment, however, because of his history of drug use.

The City argued "that Congress did not intend drug addicts to be included within the definition of handicapped for purposes of section 504."[32] Although there were no cases on point, the court determined that drug addiction fell within the terms of the statute. The court stated that:

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29. *Id.* at 596-97.

30. Recent disclosures by respected national figures (e.g., Betty Ford) and the tragedy of addictive behavior (e.g., John Belushi) have eased the stigma and encouraged disclosure. Yet the prospect of a plaintiff arguing she is a drug abuser and the employer arguing she is not appears unlikely.

31. 451 F. Supp. 791 (E.D. Penn. 1978).

32. *Id.* at 795. The court decided this case prior to amendments to the Rehabilitation Act that expressly include alcoholics and drug abusers as "handicapped individuals" as long as current use of alcohol or drugs does not prevent performance of job responsibilities and as long as employment does not constitute direct threat to property or safety of others. 29 U.S.C. § 706(7)(B) (1984).

> It is undisputed that drug addiction substantially affects an addict's ability to perform major life activities, defined by Department of Health, Education and Welfare regulations supplementing the Act, 42 Fed. Reg. 22686 et seq. (May 4, 1977) . . . as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Regulation section 84.-2(j)(2)(ii).[33]

The court further referred to a Department of Health, Education and Welfare citation wherein the Secretary relied upon a legal opinion from the Attorney General. That opinion declared that drug addiction and alcoholism are "physical or mental impairments" within the meaning of the Rehabilitation Act and that drug addicts and alcoholics are handicapped if their impairment substantially limits one of their major life activities.[34]

The current amended version of the Rehabilitation Act recognizes alcoholics and drug abusers as handicapped persons as long as their substance use does not interfere with their job performance or pose a threat to others.[35] It is now well-settled in case law that alcoholism is a handicapping condition for purposes of the discrimination protections of the Rehabilitation Act.[36]

D. Mental Disabilities

The protections against discrimination under the Rehabilitation Act cover not only physical disabilities but also mental disabilities. In this area, a defendant may be more comfortable arguing that a plaintiff is not "otherwise qualified" rather than arguing that the plaintiff does not suffer a mental disability. Given the uncertainty involved in psychology and psychiatry, a defendant may be reluctant to challenge a plaintiff's claim of disability.

There have been a number of cases recognizing mental disabilities as protected handicaps. Courts protect mental retardation[37]

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33. 451 F. Supp. at 795.

34. *Id.* at 796.

35. 29 U.S.C. § 706(7)(B) (1984).

36. Consolidated Freightways, Inc. v. Cedar Rapids Civil Serv. Comm., 366 N.W.2d 522 (Iowa 1985) (citing Rehabilitation Act for assistance in interpreting Cedar Rapids municipal ordinance and holding that alcoholism is protected handicap in employment situations only when it does not prevent proper job performance); Traynor v. Walters, 606 F. Supp. 391 (S.D.N.Y. 1985); Whitlock v. Donovan, 598 F. Supp. 126 (D.D.C. 1984); U.S. v. University Hosp., State Univ. of N.Y. at Stonybrook, 729 F.2d 144 (2d Cir. 1984).

37. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Penn. 1977) (retarded persons at state institution entitled to protection under the Rehabilitation Act).

as well as specific psychological disorders such as organic childhood schizophrenia[38] and the severe depressive neurosis in *Doe v. Region 13 Mental Health-Mental Retardation Commission*.[39]

In *Doe*, plaintiff began suffering spells of anxiety, insomnia and depression in 1977. For a six to eight month period, plaintiff consulted a physician who prescribed sleeping pills. At one point in 1977 she took a potentially lethal overdose. In 1978, she applied to work with a Gulf Coast Mental Health Center representing that her general health was excellent and that she had no physical handicap or defect. By all accounts she was a superior employee. Yet during her entire term of employment she suffered from the same psychological symptomology.[40]

Finding the Mississippi Gulf Coast something of a culture shock, the plaintiff continued to experience anxiety and depression. The heat bothered her, the day-to-day problems of life bothered her, and she had great difficulties in "coping." She was lonely, had little money, missed her family, and her apartment was without telephone or furniture. The depression was particularly notable on weekends.[41]

In November of 1978, three months after moving to her new home and job, she received psychotherapy. She was diagnosed as a depressive neurotic suffering from chronic insomnia who frequently resorted to drugs and alcohol. Plaintiff had several irrational phobias and her psychologist was concerned about the possibility of suicide. Plaintiff at one point experienced problems with her boyfriend and, with her psychologist leaving town, she voluntarily entered Gulfport Memorial Hospital for medication to relieve her depression.[42]

Throughout this period she experienced no apparent problems with her work or her caseload. Her immediate supervisor was clearly satisfied with her good work but was concerned about her obvious anxiety and agitation. She received further treatment for continued depression but continued to do good work.[43]

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38. Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869 (S.D. Tex. 1981) (whether schizophrenic child was receiving free appropriate public education to which she was entitled under the Education for All Handicapped Children Act and Rehabilitation Act of 1973).

39. 704 F.2d 1402 (5th Cir. 1983).

40. *Id.* at 1404.

41. *Id.*

42. *Id.* at 1405.

43. *Id.*

The culmination of her experience in Mississippi came in November of 1979. Her 30th birthday was November 10th and her psychologist was going out of town. She made statements to coworkers, her psychologist and her friends that she would not "see" her 30th birthday. Two days before her birthday she was taken by police from her home to the psychiatric ward at Gulfport Memorial Hospital. After interviews it was determined that she was sufficiently dangerous to herself to warrant further commitment. Although plaintiff's work performance was outstanding, defendants did not contest the issue of whether the plaintiff was handicapped within the meaning of section 504.[44]

Plaintiff's excellent work record suggests that defendants could claim plaintiff was not protected under the Rehabilitation Act. Yet it is unlikely they could overcome the substantial evidence of plaintiff's behavior away from the workplace. Given the indefinite degree of impairment that results from a mental disability, plaintiffs alleging mental disability directly confronted the "catch-22" aspect of the Rehabilitation Act.[45] Unless one has a definite history of mental disorders, as did the plaintiff in *Doe*, it may be extremely difficult to establish that one is sufficiently mentally impaired to be protected but also still "otherwise qualified."

E. Sensitivity to Tobacco Smoke

Sensitivity to tobacco smoke can be distinguished from many physical and mental disabilities. A tobacco sensitive plaintiff may be encouraged to litigate a marginal case because of a very different societal response to his allegations. For many persons tobacco smoke, while not immediately disabling, creates an uncomfortable environment. When the person genuinely debilitated by tobacco smoke steps forward and asserts a claim, that person may find a significant support group cheering her on. The many people who are either made uncomfortable or are concerned about long term health effects of "secondary smoke"[46] may rally behind this plaintiff and encourage a lawsuit because of their own interests. Rather than an avoidance attitude arising, an identification process may occur. The plaintiff may become a valued crusader, at least to some

44. *Id.* at 1408.

45. *See supra* note 21 and accompanying text.

46. Secondary tobacco smoke is tobacco smoke that lingers in the air and is inhaled by nonsmokers in close proximity.

persons. Thus marginal claims may be filed and ultimately litigated.[47]

More cases may be litigated because defendants will be more willing to challenge the existence of an impairment. Defendants, for instance, may have their own pro-smoking support groups. But more importantly, tobacco smoke is generally not a byproduct of or inherent to any particular job. Thus a defendant can no longer concede impairment and argue subsequent burdens of proof. Because tobacco smoke is not part of the job, a defendant could not argue that sensitivity to tobacco smoke prevents plaintiff from being "otherwise qualified." There remains the initial question of whether sensitivity to tobacco smoke is a protected handicap.

Vickers v. Veterans Administration[48] involved a United States Veterans Administration employee who was unusually sensitive to tobacco smoke. The employee's hypersensitivity limited him to environments that were completely smoke free. The court concluded that his unusual sensitivity to tobacco smoke did in fact limit at least one of his major life activities, his capacity to work in an environment that was not completely smoke free.[49] The court did not engage in a detailed analysis of what constitutes a major life activity but instead concentrated upon whether the Veterans Administration had made a reasonable effort to accommodate the employee.

GASP v. Mecklenburg County[50] addressed whether a North Carolina General Statute recognized persons as handicapped because they suffered discomfort and harm such as nasal and ocular irritation, allergic reactions, and acceleration of heart disease when they were in the presence of tobacco smoke. The court noted that the North Carolina General Statutes did not specifically define "handicapped person."[51] Accordingly, the court turned to the definitional section of the Rehabilitation Act and used that section as a guide. In light of that statute, the court concluded:

> It is manifestly clear that the legislature did not intend to include within the meaning of "handicapped persons" those people

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47. However, there is also a disincentive in that the plaintiff will feel the wrath of smokers. Additionally, to the degree litigation is being encouraged by an organized support group, that group may be hoping to establish a binding precedent and thus initially would encourage only the most severely affected plaintiffs and ignore marginal cases.

48. 549 F. Supp. 85 (W.D. Wash. 1982).

49. *Id.* at 86-87.

50. 42 N.C. App. 225, 256 S.E.2d 477 (1979).

51. *Id.* at 226, 256 S.E.2d at 478-79.

> with "any pulmonary problem" however minor, or *all people* who are harmed or irritated by tobacco smoke. Therefore, the class of plaintiffs as defined in the complaint does not constitute a class of "handicapped persons" within the meaning of G.S. 168-1, et seq., and the complaint was therefore properly dismissed. We do not attempt to determine, in this opinion, whether a class of persons with a particular pulmonary problem or disease such as emphysema, would be considered "handicapped persons" . . . but only that the broad class of plaintiffs defined in this complaint (i.e., persons who are harmed by tobacco smoke) are not, as a class, handicapped persons . . . . For the same reasons set forth above, the claim for relief based upon 29 U.S.C. section 794 was properly dismissed.[52]

It thus remains unclear whether sensitivity to tobacco smoke will be regarded as a protected handicap. There appears to be a split in authority developing. Where persons are afforded adequate protection by statutes or ordinances that limit smoking to carefully defined locations, smoke sensitivity cases may not arise.[53]

F. Illness

Certain illnesses, such as cancer and cystic fibrosis, have such a disabling effect on their victims that they are expressly protected in the definitional section of the Rehabilitation Act.[54] The definitional section is not exhaustive, however, as to which illnesses have severe consequences and plaintiffs may be forced to prove their protected status. If a disease is communicable, a plaintiff may actively prevent disclosure to avoid isolation. If a disease is temporary or transient, it may be difficult to establish that the illness

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52. *Id.* at 227, 256 S.E.2d at 479.

53. For instance, the Minnesota Clean Indoor Air Act provides:

> § 144.414 Prohibitions.
>
> No person shall smoke in a public place or at a public meeting except in designated smoking areas. This prohibition does not apply in cases in which an entire room or hall is used for a private social function and seating arrangements are under the control of the sponsor of the function and not of the proprietor or person in charge of the place. Furthermore, this prohibition shall not apply to factories, warehouses and similar places of work not usually frequented by the general public, except that the state commissioner of health shall establish rules to restrict or prohibit smoking in those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of non-smoking employees.

54. *See supra* note 9 and accompanying text.

substantially limits a major life activity.[55] And because illnesses may cause different symptoms in different persons, it may be difficult to rely upon precedent.

Repeated health problems combined with an uncertain diagnosis is apparently not sufficient to establish that one is a "handicapped person." *Stevens v. Stubbs*[56] concerned a plaintiff employed by the Army and Air Force Exchange Service for approximately 14 years. During 1979 and 1980, he experienced health problems requiring repeated absences. On September 6, 1979 exploratory surgery aided in a diagnosis of his ailment. His physician stated that complete recovery would take six to eight weeks. Plaintiff's supervisor requested that plaintiff be reassigned because plaintiff's performance, irrespective of his physical condition, was not acceptable. Plaintiff then requested his own transfer asserting that his current assignment had created demands on his energy and may have affected his health. The plaintiff's physician reported that he saw no reason why plaintiff could not perform his duties. After receiving a series of unsatisfactory performance reports, plaintiff alleged discrimination based upon disability.[57]

The court observed that plaintiff did not suffer from a commonly recognized handicap. Rather, the nature of the alleged handicap was somewhat uncertain. Plaintiff's supervisors did not believe that plaintiff's absences were solely due to his illnesses, but instead believed the absences resulted from his inability to cope with stress. The warning periods and unsatisfactory performance reports, in any case, did not begin until after plaintiff's physician certified him as fully able to return to work. The court concluded:

> At best the record shows only that plaintiff may have suffered from an undisclosed transitory illness which may have required him to take periods of sick leave. During the period he was evaluated, however, he had been certified by his doctor as fit for duty. Whatever the precise delineations of the term "impairment" the court is unconvinced that it encompasses transitory illnesses which have no permanent effect on the person's health.[58]

Even a chronic condition may not afford protection In *Doss v. General Motors Corporation*,[59] the court held that a chronic in-

55. *See supra* note 11 and accompanying text.
56. 576 F. Supp. 1409 (N.D. Ga. 1983).
57. *Id.* at 1414.
58. *Id.*
59. 25 F.E.P. Cases 419 (C.D. Ill. 1980).

flammatory condition in both ears and a growth in one ear, which caused the employee to suffer from impaired hearing, was merely evidence of a condition of "ill-being" as opposed to a physical condition. Therefore, plaintiff did not qualify as a handicapped person within the meaning of Illinois Equal Opportunity for the Handicapped Act. Although the case involved the interpretation of a state statute, the decision is worth noting because it reveals that courts may treat illnesses restrictively in an effort to avoid confronting the uncertain aspects of an illness. The Illinois court reached its decision in spite of the fact that the illness resulted in an arguably protected hearing loss.[60] The *Doss* court reached its decision in reliance upon *Advocates v. Sears, Roebuck and Company*, [61] which involved a job applicant with a history of nephritis. This individual had undergone a kidney transplant that restricted him from lifting heavy weights. Nonetheless, he was found not to suffer from a physical handicap within the meaning of the Illinois Constitution and the Illinois Equal Opportunity for the Handicapped Act.[62] The *Advocates* court acknowledged that the only physical impairment the plaintiff claimed was a restriction on lifting heavy weights. It stated that the General Assembly had only meant to protect those physical and mental conditions that impose severe barriers on the ability of an individual to perform major life functions.[63] The court concluded that "[w]e do not believe that the disability alleged by [plaintiff] is of the nature which falls within the commonly understood meaning of the term 'physical handicap.'"[64]

Although particular diseases are often not recognized as protected, if a disease is contagious there is a greater likelihood of protection. If a disease is contagious, however, the court may be more likely to find that the sufferer is not "otherwise qualified" for a position. The disease may involve a documented risk to others

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60. *But see* Doss v. General Motors Corp., 478 F. Supp. 139 (1979) (court stated at hearing on pre-trial motion to dismiss that total loss of hearing in right ear and major impairment of hearing in left ear was the type of handicap Illinois legislators sought to protect).

61. 67 Ill. App. 3d 512 (1978).

62. *Id.* The Illinois Appellate Court admitted that it was reaching a conclusion that conflicted with a prior decision from the neighboring state of Wisconsin. In Chrysler Outboard Corp. v. Dept. of Industry, Labor and Human Relations, 14 F.E.P. Cases 344 (1976), the Wisconsin Circuit Court held that an asthma sufferer was handicapped within the meaning of the Wisconsin Fair Employment Code. *See supra* note 4.

63. 67 Ill. App. 3d at 516-17.

64. *Id.* at 518.

that would prevent the sufferer from effectively performing a job.

The plaintiff in *Arline v. School Board of Nassau County*[65] was an elementary school teacher who had contracted tuberculosis in 1957. After beginning her teaching career in 1966, she competently performed her job for 14 years. However, she then suffered three relapses of tuberculosis. The school dismissed her after her third relapse. Alleging her susceptibility to tuberculosis made her a "handicapped individual," she brought suit under section 504. The district court held that she was not protected because the court could not "conceive that Congress intended contagious diseases to be included within the definition of a handicapped person."[66]

The Court of Appeals for the Eleventh Circuit decided, however, that tuberculosis falls within both 29 U.S.C. section 706(7)(B)[67] and 45 C.F.R. section 84.3(j)(2)(i)(A).[68] The court found no objective evidence to support the district court's conclusion because neither the regulations nor statute gave any indication that chronic contagious diseases are to be excluded. The court of appeals was reluctant to create an exception that would free recipients of federal funds from any duty to even consider whether reasonable accommodation could be made to those afflicted with contagious diseases.[69]

G. The "E.E. Black, Ltd." Approach to Determining Who Is Handicapped

E.E. Black, Ltd. v. Marshall [70] is an extremely important case analyzing what a defendant must establish in order to rebut the existence of a protected handicap. In that case, plaintiff brought a claim under section 503 of the Rehabilitation Act. Plaintiff Crosby was a 31 year old carpenter referred by his union to employer Black, Ltd., a general construction contractor. Black required all apprentice carpenter applicants to take a pre-employment physical examination. When the employer's physician detected a congenital

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65. 772 F.2d 759 (11th Cir. 1985), *cert. granted*, 90 L. Ed. 2d 179 (1986).

66. *Id.* at 763.

67. *Id.* at 764. (physical or mental impairment which substantially limits . . . major life activities).

68. *Id.* (court found tuberculosis can significantly impair respiratory functions as well as other major body systems).

69. *Id.* at 764. The court remanded the case for consideration of the question of whether reasonable accommodation was possible or whether risks of infection precluded teacher from being otherwise qualified. *Id.* at 765.

70. 497 F. Supp. 1088 (D. Haw. 1980).

back anomaly, a partially sacralized transitional vertebra, plaintiff was not recalled for an apprentice carpenter position. Plaintiff then brought suit.

An administrative law judge concluded that plaintiff's medical condition, as it existed, in no way impaired his present ability to perform all of the physical functions of a carpenter's apprentice. The medical dispute focused solely upon whether the condition would tend to lead to back pain and injury in the future. The administrative law judge stated that the term "impairment" meant "any condition which weakens, diminishes, restricts or otherwise damages an individual's health or physical or mental activity."[71] The administrative law judge concluded that although plaintiff had an impairment, it had not been proven that this impairment substantially limited a major life activity.

The administrative law judge further determined that Congress was not attempting to protect people with any impairment, but instead only those with the most disabling impairments. In other words, a plaintiff must demonstrate that an impairment impedes activities relevant to many or most jobs. Because the judge perceived Crosby's impairment as only partially limiting his access to employment, the judge did not consider Crosby's condition severe enough to allow recovery under the statute.[72]

The plaintiff appealed the administrative law judge's decision to the Assistant Secretary of Labor for Employment Standards.[73] The Assistant Secretary concluded that coverage under the Act did not require a showing that the impairment impeded activities relating to many or most jobs, but rather that protection under the Act is extended to every individual with an impairment that, "is a current bar to the employment of one's choice with a federal contractor which the individual is currently capable of performing."[74] The Assistant Secretary concluded that, because the perceived impairment prevented Crosby from securing the job he wanted, Crosby was a handicapped individual under the Rehabilitation Act.[75]

The district court asserted that the Assistant Secretary's interpretation of the Act and the regulations was overbroad. It stated

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71. *Id.* at 1093.
72. *Id.* at 1093-94.
73. OFCCP v. E.E. Black, Ltd., 19 F.E.P. Cases 1624 (1979).
74. *Id.* at 1633.
75. 497 F. Supp. at 1095.

that an individual with a fear of heights offered ten jobs with a particular company but disqualified from one job because it was on the 37th floor would be covered by the Act under the Assistant Secretary's interpretation, in spite of the fact that nine job offers were outstanding.[76] Similarly, an individual with a hearing sensitivity denied employment at a noisy location, but offered a position elsewhere, would also be covered by the Act.[77] This was not the result intended by Congress. Otherwise, Congress would not have used the terms substantial handicap or substantial limits. Congress would instead have stated that the Act covered any handicap or limitation.

The district court also concluded that the definition adopted by the administrative law judge was invalid. That definition drastically reduced the coverage of the Act. A person, for example, with a graduate degree in chemistry but turned down for a chemist's job due to his handicap would not likely be helped by the news that he could still be a street car conductor.[78] A person who is disqualified in his chosen field has a substantial handicap to employment and is substantially limited in a major life activity. The court then declared the following test:

> A handicapped individual is one who 'has a physical or mental disability *which for such individual* constitutes or results in a substantial handicap to employment.' . . . It is the impaired individual that must be examined, and not just the impairment in the abstract.[79]

E.E. Black, Ltd. v. Marshall establishes that one must focus on the individual job seeker and not solely on the impairment or the perceived impairment. This requires a case-by-case determination of whether the impairment or perceived impairment of a rejected, qualified job seeker constitutes for that individual a substantial handicap to employment. Important factors include the number and types of jobs from which the impaired individual is disqualified. The court must examine the geographical area to which the applicant has access and take into account the person's own job expectations and training. If an individual is disqualified from the same or similar jobs offered by employers throughout the area to

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76. *Id.* at 1099.
77. *Id.*
78. *Id.*
79. *Id.*

which he has reasonable access, then his impairment or perceived impairment would result in a substantial handicap to employability.[80] The court affirmed its belief that Congress intended the Rehabilitation Act to be broad in scope and intended that questions as to coverage be answered on a case-by-case basis. The reduction in the coverage of the Act proposed by the administrative law judge would defeat this Congressional intent.

Thus the *E.E. Black* court established the rule that a specific physical or mental condition that has the exact same effect on different individuals may amount to a protected handicap for one person and not for the other. In other words, the definition of what is a protected handicap under the Rehabilitation Act is not limited to literal descriptions of disabilities. To the degree that the *E.E. Black* district court opinion becomes recognized as law in other jurisdictions, most attempts to define protected handicaps solely on the basis of the nature of the disability will not be successful.

The question of physical disability is one of degree. Several cases involving impaired vision support this conclusion. *Norcross v. Sneed*[81] involved a plaintiff possessing a congenital impairment leading to 20/200 corrected visual acuity in one eye and unmeasureable vision in the other eye. The little vision left in the second eye resulted in double vision and distortion of the corrected vision in the first eye. The plaintiff had no night vision. Plaintiff's opthamologist had certified her "legally blind" as had the federal government for purposes of receiving federal benefits accorded to blind persons. Faced with this evidence, the defendants wisely did not question the plaintiff's condition and plaintiff was found to be a "handicapped individual" within the meaning of the Rehabilitation Act.[82]

Yet even if a particular impairment is acknowledged to exist, it may not be sufficiently disabling to warrant protection. A plaintiff born with a mild case of strabismus, commonly known as crossed-eyes, alleged unlawful discrimination in *Jasany v. United States Postal Service*.[83] Plaintiff had passed the Letter Sorter Machine Vision Examination and satisfied other requirements for the position of Distribution Clerk Machine Trainee. He was hired and began operating a mail sorting machine. After three months as a

80. *Id.* at 1101.
81. 573 F. Supp. 533 (W.D. Ark. 1983).
82. *Id.* at 536.
83. 755 F. 2d 1244 (6th Cir. 1985).

mail sorting machine operator, plaintiff began to develop eye strain, headaches, and excessive tearing. A physician's examination indicated that plaintiff's symptoms were the result of the detailed visual work required to operate the mail sorting machine combined with his condition of strabismus. Plaintiff subsequently refused to operate the mail sorting machine and was suspended from work. After returning from his suspension, he again refused to operate the machine. His employer then gave him a fitness for duty examination and found him to be disqualified for further employment as a mail sorting machine operator. After his ensuing discharge, plaintiff brought suit.

On appeal, defendants concentrated on the fact that plaintiff had to establish not only that he suffered from a physical or mental impairment but also that this impairment substantially limited a major life activity. Defendants decided not to argue that the strabismus was not a "physical or mental impairment." Rather, they asserted the impairment did not substantially limit a major life activity.[84]

The court in *Jasany* engaged in a detailed analysis of *E.E. Black, Ltd. v. Marshall*.[85] The *Jasany* court agreed with the *E.E. Black* court's conclusion that a determination of whether an impairment substantially limits an individual's employment potential focuses upon the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual's job expectations and training.[86] The *Jasany* court asserted, however, that the *E.E. Black* court did not adequately analyze the focus and relationship of the definitional elements of the statute—impairment, substantial limitation of a major life activity, and qualified person. The *Jasany* court explained that it is part of the plaintiff's prima facie case to establish the existence of an impairment that substantially limits a major life activity.[87] If the plaintiff fails to establish a prima facie case, the defendant need not worry about addressing reasonable accommodation.[88]

In *Jasany*, the parties stipulated that plaintiff's condition had never had any effect whatsoever on any of his activities, including

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84. *Id.* at 1248.
85. 497 F. Supp. at 1098.
86. 755 F.2d at 1249.
87. *Id.*
88. *Id.* at 1250.

his past work history and ability to carry out other duties at the post office apart from the mail sorting machine. Consequently, the *Jasany* court found that the district court erred as a matter of law in finding that the appellant Jasany was a handicapped person. In fact, the court recognized the possibility that the strabismus was so minor that it did not even rise to the level of a physical impairment.[89] Yet the court did not discuss whether this was a physical impairment.

The court made it clear that the burden is on the plaintiff to establish not only the existence of an impairment, but to also establish an impairment that substantially limits a major life activity. Because the strabismus had no effect on any of his other activities, including his past work history and ability to carry out any other duty at the post office, the court concluded that Jasany did not establish that he was a handicapped person.[90]

H. Challenging an Allegation of Handicap

The reluctance of a defendant to challenge the existence of a mental or physical impairment does not mean the defendant cannot argue that a plaintiff is not a "handicapped individual" within the meaning of the Rehabilitation Act. The defendant can explain that although an impairment exists it does not substantially limit a major life activity. Any plaintiff alleging that he or she is a handicapped person within the meaning of the Rehabilitation Act must be aware that proving the existence of a physical or mental impairment alone will not satisfy his burden of proof. A disabled person must also be prepared to establish that his impairment affects a major life activity.

There are three possible approaches for any defendant. First, a defendant can challenge whether there is a physical or mental impairment. This will probably involve substantial medical investigation. Second, a defendant can concede an impairment and argue, as defendants did in *Jasany*, that this impairment does not substantially limit a major life activity.[91] Third, a defendant can concede both impairment and substantial limita-

89. *Id.* at 1250 n.6.

90. *Id.* at 1250.

91. *See also* Oesterling v. Walters, 760 F.2d 859 (8th Cir. 1985) (court of appeals recognized plaintiff's varicose veins as an impairment and that this condition affected her ability to sit and stand, which are major life activities; the court refused, however, to reverse the lower court's finding that these life activities were not *substantially* limited).

tion and still argue that the plaintiff is not "qualified"[92] or not "otherwise qualified."[93]

III. Conclusion

There is not an exhaustive body of case law revealing exactly which disabilities will be considered as protected under the Rehabilitation Act of 1973. Certain specific conditions are identified as protected within the Rehabilitation Act and its accompanying regulations. Defendants have tended not to challenge allegations that these specific conditions exist. The Act protects alcoholics and drug abusers when their substance use does not interfere with performance or threaten others. If the plaintiff can establish a mental disability, the Act may afford that disability protection. Courts addressing the protection of transient and even chronic diseases have not found such illnesses included within the Act's scope, although one court found the Act to protect the contagious disease of tuberculosis. The Act does not protect the conditions of left-handedness and a particular body-weight acquired as a result of weightlifting.

A plaintiff alleging a protected handicap not only must establish a physical or mental impairment but also must show this impairment substantially limits a major life activity. Defendants have successfully shown that certain conditions such as strabismus do not substantially limit major life activities.

An effort to compile a definitive list of protected handicaps is not likely to be successful. One must examine disabilities in the context of the person having that disability. Furthermore, one must determine the number and types of jobs from which a plaintiff is disqualified, the geographical area to which the plaintiff has access, and the plaintiff's training, education and employment expectations.

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92. Handicapped persons must be "qualified" under § 793.

93. Handicapped persons must be "otherwise qualified" under § 794.

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